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No. 249

In the Supreme Court of the United States

OCTOBER TERM, 1962

SUN OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

Orders Nos. 232 and 232A of the Federal Power Commission (R. 57–63, J.A.[1] 5–8; R. 80–83, J.A. 28–31) are reported at 25 F.P.C. 379, 26 F.R. 1983, and 25 F.P.C. 609, 26 F.R. 2850. The opinion of the Court of Appeals (Pet. App. A, pp. 1a–5a) is reported at 304 F. 2d 293.

[1] The printed joint appendix is found at pages 51 through 94 of the full record filed in this Court. References to materials in the joint appendix will be to the page as numbered for the record "(R. —)" as well as to the original joint appendix pagination "(J.A. —)".

JURISDICTION

The judgment of the Court of Appeals was entered on April 25, 1962 (Pet. App. A., p. 5a). A timely petition for rehearing was denied on May 29, 1962 (Pet. App. A., p. 5a). The petition for a writ of certiorari was filed on July 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether a Court of Appeals has jurisdiction, under Section 19(b) of the Natural Gas Act, to review an order promulgating a rule of general applicability which declares certain types of indefinite rate change provisions in independent producer contracts inoperative and of no effect at law.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act are set forth in Appendix B to the Petition at pages 6a–14a.

STATEMENT

Petitioner, an independent producer of natural gas, sought review (R. 2–32) in the Court of Appeals for the Fifth Circuit of the Commission's Order No. 232 (R. 57–63, J.A. 5–8), as amended by Order No. 232A (R. 80–83, J.A. 28–31). By that order, as modified, the Commission amended Section 154.93 of the Commission's Regulations under the Natural Gas Act, 18 C.F.R. 154.93, which defines "rate schedules" for inde-

pendent producers of natural gas, by adding the following proviso (R. 82–83, J.A. 30–31):

> * * * That in contracts executed on or after April 3, 1961, for the sale or transportation of natural gas subject to the jurisdiction of the Commission, any provision for a change of price other than the following provisions shall be inoperative and of no effect at law; the permissible provisions for a change in price are
> (1) provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller;
> (2) provisions that change a price to a specific amount at a definite date; and
> (3) provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount [paragraph (2)], change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and are in the area of the price in question.

The Court of Appeals dismissed the petition, holding that the Commission order was not reviewable under Section 19(b) of the Natural Gas Act.

The Commission issued the order sought to be reviewed in a rule-making proceeding initiated by a notice of proposed rule-making published in the Federal Register on April 12, 1956 (21 F.R. 2388), and by mailing notices to interested parties, including state and federal regulatory agencies (R. 57, J.A. 5).

In its notice (R. 54–56, J.A. 2–4), the Commission stated that it proposed to amend its regulations relating to independent producers, so as to describe certain types of contracts for the sale of natural gas which would not be accepted for filing as rate schedules (R. 55, J.A. 3).[2]

The Commission, in its notice, invited comments on or before June 1, 1956, and stated that it would not act prior to receipt of such comments (R. 56, J.A. 4). Numerous responses were received by the Commission, both in support of and in opposition to the proposed rule (R. 40–46). No response was received from the petitioner. Thereafter, in *Pure Oil Co.*, 25 F.P.C. 383, affirmed, 299 F. 2d 370 (C.A. 7), an adjudicatory proceeding held in connection with an increased filing under Section 4 of the Natural Gas Act, the Commission received the benefit of extensive hearings, briefs and oral argument on the issue of whether or not "favored-nation" clauses are contrary to public policy.[3]

On March 3, 1961, simultaneously with its release of the decision in *Pure Oil, supra*, the Commission issued

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[2] Its specific proposal was that the Commission would not accept for filing contracts containing provisions calling for price adjustments involving "(a) escalator clauses based on price indices or changes in the price received by the purchaser upon resale, or (b) the payment or offer of payment of higher prices by the purchaser or other purchasers in the same or other producing areas to the same or other sellers" (R. 56, J.A. 4).

[3] While that case was decided on other grounds, the Commission, as stated in Order No. 232 (R. 58, J.A. 6), explained in detail why it regarded indefinite escalation clauses to be contrary to the public interest. *Pure Oil Co.*, 25 F.P.C. 383, 387–391.

Order No. 232, amending its regulations. It found that long-term gas supply contracts containing so-called "indefinite" escalation clauses—which it defined as all price escalation provisions other than those calling for increases of specific amounts at definite dates or those intended to reimburse the seller for all or any part of changes in production, severance or gathering taxes levied on the seller—" * * * have contributed instability and uncertainty concerning prices of gas and service expansion by natural gas companies," and, as found in *Pure Oil Co.*, 25 F.P.C. 383, are contrary to the public interest. For these reasons, the Commission amended its regulations to prohibit use of indefinite escalation provisions in new producer contracts. It originally did so by adding definitions of "definite" and "indefinite" escalation clauses to Section 154.91 of its regulations, and by adding a proviso to Section 154.93 of its regulations declaring that any provision for a change of price based on an indefinite escalation clause in a contract filed on or after April 3, 1961, would be "inoperative and of no effect at law" (R. 59–60, 63, J.A. 7–8, 11). The order provided that the amendments to the regulations would become effective April 3, 1961, but, in view of the period of time which had elapsed since the original notice of rule-making, that any interested person could submit written views or comments to the Commission by March 20, 1961 (R. 60, J.A. 8). On March 31, 1961, the Commission, upon consideration of comments filed by interested persons, issued Order No. 232A, modifying the amendments to

the regulations promulgated by Order No. 232, which were to become effective April 3, 1961 (R. 80–83, J.A. 28–31).

In this new order, the Commission found that the "elimination of all indefinite escalation provisions would be too restrictive to enable the industry adequately to cope with possible changing economic conditions over the span of long-term contracts. Therefore, to permit pricing flexibility and to provide an incentive for long-term contracts, we should permit future contracts to contain limited price redetermination provisions, invocable not more than once in every five-year contract period and based upon rates subject to this Commission's jurisdiction (and, therefore, controlled)" (R. 80–81, J.A. 28–29). It also decided that the amendment to the regulation would apply only to contracts "executed" on or after April 3, 1961. (Under Order No. 232 the amendment would have applied to contracts "filed" on or after that date, whenever executed.) The amendment to the regulation was also modified to conform with these conclusions. As modified, the regulations were amended, effective April 3, 1961, by the addition of a proviso to the definition of rate schedule for independent producers, set out in Section 154.93 of the Commission's Regulations under the Natural Gas Act, 18 C.F.R. 154.93. This provision states that only three types of rate change provisions will be given any effect, *supra*, p. 3. An application for rehearing from Order No. 232A tendered by petitioner (R. 84–91, J.A. 32–39) was rejected on the ground that Order No.

232A prescribes a general rule from which an application for rehearing does not lie (R. 94, J.A. 42).

On review, the Court of Appeals for the Fifth Circuit, after briefs and oral argument, dismissed Sun's petition on the ground that the order promulgating the Commission's regulations was not subject to review under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b) (Pet. App. pp. 3a, 12a-14a).[4]

ARGUMENT

The court below was, we believe, clearly correct in holding that Section 19(b) of the Natural Gas Act vests no jurisdiction in it to review orders of the Commission amending its general rules and regulations. Since the courts of appeals have consistently reached this result and there is no conflict of decision, there is no occasion for review here.

1. Each of the four Courts of Appeals in which review of Commission orders of general applicability has been sought under Section 19(b) of the Natural Gas Act has found that there is no jurisdiction to grant such review. See *United Gas Pipe Line Co.* v. *Federal*

[4] The section of the regulations here involved was further modified by Order No. 242 of the Commission, 27 F.R. 1356 (issued February 8, 1962), to provide that any contract executed on April 2, 1962, or thereafter, containing any proscribed price-changing provision would be rejected if filed as a rate schedule. Order No. 242 also provides (1) that, an independent producer's application for a certificate of public convenience will be rejected if it relies on any contract executed on or after April 2, 1962, containing a proscribed price-changing provision, and (2) that in a pipeline's certificate proceeding such contracts would not be considered in support of a pipeline's certificate application.

Power Commission, 181 F. 2d 796 (C.A.D.C.), certiorari denied, 340 U.S. 827 (order issuing rules requiring pipeline companies to file rates in tariff form); *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (C.A. 10) (order issuing rules after decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, to provide procedures applicable to independent producers); *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785 (C.A. 5), certiorari denied, 352 U.S 968 (generally same as *Amerada*); *Shell Oil Co.* v. *Federal Power Commission*, C.A. 3, No. 14058, decided July 17, 1962 (Order No. 242, *supra*, p. 4, providing for rejection of rate schedules and certificate applications containing indefinite price-changing provisions made invalid by Order Nos. 232 and 232A); *Hunt Oil Co.* v. *Federal Power Commission*, C.A. 5, Nos. 19711, *et al.*, decided August 14, 1962 (same as *Shell*); cf. *Wisconsin* v. *Federal Power Commission*, 292 F. 2d 753 (C.A.D.C.) (policy statement prescribing area price levels to be followed by the Commission in determining acceptability of initial price proposals and increased rate filings of independent producers).

As these courts recognized, Congress, in enacting Section 19(b), did not make every Commission action reviewable in the courts of appeals but rather prescribed, as it may (*e.g.*, *American Power & Light Co.* v. *Securities and Exchange Commission*, 325 U.S. 385, 389–390, *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401, 404; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U.S. 156, 159), certain conditions which must be

met before a court of appeals may review Commission action. As this Court's opinion in *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384, points out, Section 313(b) of the Federal Power Act (which contains provisions identical to those contained in Section 19(b) of the Natural Gas Act), indicates

> "* * * the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court "a transcript of the record upon which the order complained of was entered." The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

The review provisions of Section 19(b) "evidence Congressional recognition that an appellate court has no intelligible basis for decision unless a subordinat tribunal has made a record fully encompassing the issues." *United Gas Pipe Line Co. v. Federal Power Commission,* 181 F. 2d 796, 799, certiorari denied, 340 U.S. 827. Indeed, Section 19(b) permits review only at the instance of a "party to a proceeding" who is "aggrieved" by the Commission's "order". Mere aggrievement is not sufficient to support review (*Mag-*

nolia Petroleum Co. v. *Federal Power Commission*, 236 F. 2d 785, 792, certiorari denied, 352 U.S. 968), and, of course, it is settled that not every Commission action or order is a reviewable "order." *E.g.*, *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375 (refusal to limit evidence in rehearing to issues raised by application for rehearing); *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (findings as to lawfulness of past rates); *Northern Natural Gas Co.* v. *Federal Power Commission*, 288 F. 2d 441 (C.A. 3) (order allowing intervention); *Amerada Petroleum Corp.* v. *Federal Power Commission*, 285 F. 2d 737 (C.A. 10) (order denying offer of compromise); *Humble Oil & Refining Co.* v. *Federal Power Commission*, 236 F. 2d 819 (C.A. 5) certiorari denied, 352 U.S. 967 (order suspending changed rates); *Aluminum Company of America* v. *Federal Power Commission*, 130 F. 2d 445 (C.A.D.C.) (order denying request for trial examiner's report); *East Ohio Gas Co.* v. *Federal Power Commission*, 115 F. 2d 385 (C.A. 6) (order instituting investigation).

Finally no objection to an "order" may be considered on review unless it shall have been urged before the Commission in an "application for rehearing." It is clear, therefore, that Section 19(b) contemplates review only of orders issued in proceedings of an adjudicatory nature, *i.e.*, those in which the final Commission action is entered after a hearing or opportunity therefor, and based on a record.

2. Order No. 232, 26 F.R. 1983, as amended by Order No. 232A, 26 F.R. 2850, does not meet Section 19(b)'s "distinctive formulation of the conditions under which resort to the courts may be made." Cf. *Federal*

Power Commission v. *Pacific Power & Light Co.*, 307 U.S. 156, 159. In amending its regulations by issuance of these orders, the Commission proceeded in announced reliance on Sections 4, 7, and 16 of the Natural Gas Act and promulgated regulations purporting to be of general applicability as authorized by these sections. These provisions do not require the holding of a hearing or any other kind of "proceeding" prior to the promulgation of regulations, and none was in fact held. Nor did the Administrative Procedure Act require a "proceeding" of the kind plainly envisaged by Section 19(b). That statute requires only that the Commission give appropriate notice to the persons subject to the proposed rule (Section 4(a), 60 Stat. 238, 5 U.S.C. 1003(a)), and afford interested persons an opportunity to submit "written data, views, or arguments with or without opportunity to present the same orally in any manner (Section 4(b), 60 Stat. 238, 5 U.S.C. 1003(b)).[5] Thus, while the procedural requirements for issuing a rule were met here, there was no evidence or record of the sort contemplated as prerequisites for review under Section 19(b) of the Natural Gas Act.

Moreover, consistently with the Commission's compliance with the rule-making procedure, the orders sought to be reviewed show on their face that they are of general applicability. They are intended to apply generally to all independent producers of natural gas. And, while the regulations limited the

[5] In promulgating general rules, as in legislation, there is no constitutional right to a hearing, *Bi-Metallic Investment Co.* v. *State Board of Equalization of Colorado*, 239 U.S. 441; *Bowles* v. *Willingham*, 321 U.S. 503, 519–520.

types of permissible escalation provisions in contracts executed after the effective date of the amendment to the regulation, this amendment did not affect any existing contracts. For by its terms, the promulgating order made the amendment apply only to contracts executed on or after April 3, 1961, which postdates both Orders No. 232 and 232A.

In these circumstances, it seems plain that the amendment to the regulations involved rule making, not adjudication, that hence no hearing was required prior to its issuance, and that it is not reviewable at this time under Section 19(b) of the Act.

3. Petitioner's reliance (Pet. 7, 13–16) on such cases as *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407, and *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, in which rules of general applicability were held to be reviewable under other statutes, is misplaced. Such cases arise under statutes which, unlike Section 19(b) of the Natural Gas Act, do not limit review to parties to proceedings of an adjudicatory nature.[6] In each in-

[6] In *Columbia Broadcasting*, *supra*, review was pursuant to Section 402(a) of the Communications Act, 48 Stat. 1093, which permitted suits to "enjoin, set aside, annul or suspend any order of the Commission", except those involving certain license matters, pursuant to the provisions of the Urgent Deficiencies Act, 38 Stat. 219, 28 U.S.C. 1253, 2101, 2284, 2325. The licensing orders excluded from Section 402(a) suits were to be reviewed directly by the Court of Appeals for the District of Columbia, pursuant to 47 U.S.C. 402(b), which, like Section 19(b) of the Gas Act, contemplates review only of orders issued in adjudicatory type proceedings.

In *Storer Broadcasting*, *supra*, review was also pursuant to Section 402(a) of the Communications Act, 47 U.S.C. 402(a), though review jurisdiction had by then been transferred from

stance, moreover, the rule in question was deemed by the Court to have an immediate impact not only upon petitioner's planning for the future, but upon its existing operations as well.[7] At least three courts of appeals have recognized that cases construing other statutory provisions governing reviewability do not control in dealing with the more restricted provisions of Section 19(b). See, *e.g.*, *Wisconsin* v. *Federal Power Commission*, 292 F. 2d 733, 755 (C.A.D.C.); *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785, 792 (C.A. 5), certiorari denied, 352 U.S. 968; *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461, 464 (C.A. 10). Moreover, as indicated, *supra*, the rule involved here, unlike the rules in the cases cited by petitioners, was expressly made applicable only to contracts entered

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three-judge district courts to the various courts of appeals. See Act of December 29, 1950, 64 Stat. 1129, as amended, 5 U.S.C. 1032–1042. The change in review court was not intended to affect the prior law on the nature of orders reviewable under Section 402(a). See H. Rep. No. 2122, 81st Cong., 2d Sess.

[7] In *Columbia Broadcasting*, *supra*, this Court found that the network's affiliates were then cancelling or threatening to cancel existing contracts to conform to the regulations there involved (316 U.S. at 423). In *Storer Broadcasting*, *supra*, aggrievement was found to exist not just because of its effect on business planning but also because acquisitions of Storer's stock by certain members of the public not subject to Storer control could result in a forfeiture of existing Storer licenses. See 351 U.S. at 197, 199–200. Similarly, in *Frozen Food Express* v. *United States*, 351 U.S. 40, an order was found reviewable where disregard of it could subject a carrier to criminal penalties.

into after its adoption. It can in no way affect Sun's rights under contracts consummated prior to that date, to say nothing of its rights under certificates previously issued on the basis of such contracts.

We do not suggest, of course, that the amendment to the regulation here involved is completely beyond judicial review, but only that the promulgating order is not itself directly reviewable under Section 19(b). Petitioner or others, if aggrieved, will, of course, be able to test the validity of the amendment if the Commission rejects an increased rate filing based on an invalid price escalation provision, or (in accordance with the further amendment to the regulation made by Order No. 242, *supra*, p. 7, n. 4) rejects a rate schedule or certificate application containing an invalid pricing clause. See, *e.g.*, *Sun Oil Co.* v. *Federal Power Commission*, 266 F. 2d 222 (C.A. 5), affirmed 364 U.S. 170.[8]

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[8] Unlike the situation in *Columbia Broadcasting*, *supra*, it has not been shown that, as a result of Order No. 232, as amended by Order No. 232A, contracts containing non-permissible pricing clauses cannot be negotiated by either petitioners or other producers. That such clauses can be negotiated is clear from the fact that the Commission recently had occasion to reject producer applications for certificates of public convenience and necessity because they were based on contracts executed after April 2, 1962 (the effective date of Order No. 242) which contained non-permissible price changing provisions. *E.g.*, *Cities Service Petroleum Co.*, F.P.C. Docket No. CI63-131, letter order issued August 16, 1962 (unreported); *Gulf Oil Corp.*, F.P.C. Docket No. G-16524, letters orders issued July 27, 1962 and August 17, 1962 (unreported).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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